



April 3, 2007

ENGROSSED SENATE BILL No. 411

DIGEST OF SB 411 (Updated March 29, 2007 12:28 pm - DI 51)

Citations Affected: IC 35-33.5.

Synopsis: Wiretap law. Includes additional offenses as designated offenses for purposes of intercepting electronic communication. Defines "electronic communication" to include any type of communication transmitted by a wire, a radio, orally, or an electromagnetic, a photoelectronic or a photo-optical system, and replaces references to interception of a telephonic or telegraphic communication. Permits the state police department to authorize a law enforcement agency that has requested an interception to operate or monitor equipment under the supervision of the state police department. Specifies that the superintendent of the state police department may terminate an interception if there is probable cause that the allegations on which the interception is based are without merit. Requires a law enforcement agency on whose behalf the state police department undertakes an interception to reimburse the state police department in certain circumstances. Establishes a procedure to permit a warrant for the interception of electronic communication to be issued without a written affidavit if certain conditions are met. Provides that a warrant issued without a written affidavit expires not more than 24 hours after it is issued. Repeals a provision requiring automatic appellate review of warrants issued for an intercept. Makes other changes.

Effective: July 1, 2007.

Hershman, Wyss, Steele

(HOUSE SPONSORS — TINCHER, BELL)

January 11, 2007, read first time and referred to Committee on Corrections, Criminal, and Civil Matters.

February 15, 2007, amended, reported favorably — Do Pass.

February 19, 2007, read second time, ordered engrossed. Engrossed.

February 20, 2007, read third time, passed. Yeas 46, nays 1.

HOUSE ACTION

March 6, 2007, read first time and referred to Committee on Interstate and International Cooperation.

April 2, 2007, amended, reported — Do Pass.

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April 3, 2007

First Regular Session 115th General Assembly (2007)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2006 Regular Session of the General Assembly.

ENGROSSED SENATE BILL No. 411

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 35-33.5-1-1 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 1. This article does not
3 apply to the ordinary course of business pertaining to the operation of
4 a ~~telephone or telegraph corporation and the use of the services and~~
5 ~~facilities furnished by that corporation~~ **a business entity that provides**
6 **or facilitates electronic communications** in accordance with the
7 ~~corporation's business entity's~~ tariffs.

8 SECTION 2. IC 35-33.5-1-3 IS AMENDED TO READ AS
9 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 3. "Designated offense"
10 means the following:

11 (1) A Class A, Class B, or Class C felony that is a controlled
12 substance offense (IC 35-48-4).

13 (2) Murder (IC 35-42-1-1). ~~while committing or attempting to~~
14 ~~commit a controlled substance offense under IC 35-48-4-1~~
15 ~~through IC 35-48-4-4.~~

16 (3) **Kidnapping (IC 35-42-3-2).**

17 (4) **Criminal confinement (IC 35-42-3-3).**

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- (5) Robbery (IC 35-42-5-1).
- (6) Arson (IC 35-43-1-1).
- (7) Child solicitation (IC 35-42-4-6).
- (8) Human and sexual trafficking crimes under IC 35-42-3.5.
- (9) Escape as a Class B felony or Class C felony (IC 35-44-3-5).
- (10) An offense that relates to a weapon of mass destruction (as defined in 35-41-1-29.4).
- (11) An attempt or conspiracy to commit an offense described in subsections (1) through (10).
- (12) An offense under the law of the United States or in another state or country that is substantially similar to an offense described in subdivisions (1) through (11).

SECTION 3. IC 35-33.5-1-3.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: **Sec. 3.5. "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, oral communication, digital information, or intelligence of any nature transmitted in whole or in part by a wire, a radio, or an electromagnetic, a photoelectronic, or a photo-optical system.**

SECTION 4. IC 35-33.5-1-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: **Sec. 5. "Interception" means the intentional**

- (1) recording of; or
- (2) acquisition of the contents of

a telephonic or telegraphic an electronic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article. This term includes the intentional recording or acquisition of communication through the use of a computer or a FAX (facsimile transmission) machine. The term does not include recording or acquiring the contents of a radio transmission that is not:

- (1) scrambled or encrypted;
- (2) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of the communication;
- (3) carried on a subcarrier or other signal subsidiary to a radio transmission;
- (4) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

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(5) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

SECTION 5. IC 35-33.5-1-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 6. "Warrant" means a warrant authorizing the interception of ~~telephonic or telegraphic~~ **electronic** communication under this article.

SECTION 6. IC 35-33.5-2-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 1. (a) A prosecuting attorney ~~or, if the prosecuting attorney is unavailable, a chief deputy prosecuting attorney specifically authorized by the prosecuting attorney,~~ may submit an application for a warrant or an extension to a circuit or superior court where:

- (1) the county that the prosecuting attorney represents is located; and
- (2) the communication subject to the warrant is anticipated to be sent or received.

The prosecuting attorney ~~or authorized chief deputy prosecuting attorney~~ may not delegate the responsibility of applying for a warrant or an extension to ~~a~~ **another** deputy prosecuting attorney.

(b) One (1) of the following persons must serve as a coapplicant for a warrant or an extension under subsection (a):

- (1) The superintendent of the state police department.
- (2) The police chief of a consolidated city where the communication subject to the warrant is anticipated to be sent or received.
- (3) The sheriff of the county containing a consolidated city where the communication subject to the warrant is anticipated to be sent or received.

(c) Only the state police department may install ~~operate; or monitor~~ any equipment ~~device; or instrument for the purpose of intercepting a telephonic or telegraphic used to intercept an electronic~~ communication under this chapter.

(d) The state police department may:

- (1) ~~operate or monitor equipment used to intercept an electronic communication; or~~
- (2) ~~if the interception of an electronic communication is performed on behalf of another law enforcement agency,~~

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1 permit the law enforcement agency to operate or monitor the
2 equipment under the supervision of the department.

3 (e) The superintendent of the state police department may
4 terminate an interception under this chapter if the superintendent
5 of the state police department determines that there is probable
6 cause to believe that the allegations concerning the offense that are
7 the basis of the interception are without merit. If an interception
8 of an electronic communication is terminated under this
9 subsection, the law enforcement agency that is the co-applicant for
10 the interception shall reimburse the state police department for the
11 department's expenses incurred in connection with the application
12 for interception, including the costs of removing equipment related
13 to the interception.

14 (f) If the interception of an electronic communication is
15 performed on behalf of another law enforcement agency, the law
16 enforcement agency shall reimburse the department for the
17 department's expenses in connection with the installation,
18 operation, and maintenance of equipment used to intercept an
19 electronic communication.

20 SECTION 7. IC 35-33.5-2-2 IS AMENDED TO READ AS
21 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 2. (a) **Except as**
22 **provided in section 3.5 of this chapter**, an application for a warrant
23 or extension must be made in writing and upon oath or affirmation.
24 Each application must also include the following:

- 25 (1) The identity of the persons submitting the application.
- 26 (2) An affidavit setting forth the facts relied upon by an applicant
27 to show why a warrant should be issued or an extension granted,
28 including the following:
 - 29 (A) Facts establishing probable cause for the belief that a
30 designated offense allegedly has been, is being, or may be
31 committed.
 - 32 (B) A description of the nature and location of the facility, ~~or~~
33 place, **or device** from which the communication is to be
34 intercepted.
 - 35 (C) The identity, if known, of the person allegedly committing
36 the designated offense whose communication is to be
37 intercepted.
 - 38 (D) A description of the type of communication to be
39 intercepted.
- 40 (3) A statement specifying that other investigative procedures:
 - 41 (A) have been tried and failed; or
 - 42 (B) may not succeed or are too dangerous to attempt.

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(4) A statement of the duration necessary for the interception. However, if the applicant requests that the authorization for interception not automatically terminate once the described type of communication is initially obtained, the application must also include a description of facts supporting the belief that additional communications of the same type will occur.

(5) A statement of facts and any action taken by the court concerning any previous application for a warrant or an extension that:

(A) has been made to a court under this article;

(B) sought to obtain communications from any of the same persons, places, or facilities as the current application; and

(C) is known to exist by the persons making the current application.

(6) If it is reasonably necessary to make a secret entry upon private property to install an interception device, a statement describing the following:

(A) The private property.

(B) Who owns and who occupies the private property.

(C) The reasons necessitating secret entry.

(b) In addition to the information required in subsection (a), if an application is for an extension, the application must contain a statement setting forth the results obtained from the original warrant or a reasonable explanation of the failure to obtain results under the original warrant.

(c) The court may require an applicant to furnish additional testimony or evidence in support of an application.

SECTION 8. IC 35-33.5-2-3.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: **Sec. 3.5. (a) A court may issue a warrant without the affidavit required under section 2 of this chapter, if the court receives sworn testimony of the same facts required for an affidavit:**

(1) in a nonadversarial, recorded hearing before the judge;

(2) orally by telephone or radio; or

(3) in writing by facsimile (fax) transmission.

In addition, the prosecuting attorney or, if the prosecuting attorney is unavailable, a chief deputy prosecuting attorney specifically authorized by the prosecuting attorney, shall inform the court that a person described in section 1(b) of this chapter has agreed to serve as a coapplicant of the warrant. The prosecuting attorney or authorized chief deputy prosecuting attorney may not delegate the

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responsibility of applying for a warrant to another deputy prosecuting attorney.

(b) After the affiant recites the facts required for an affidavit and verifies the facts recited under penalty of perjury, a prosecuting attorney or chief deputy prosecuting attorney who applies for a warrant under subsection (a)(2) shall read to the court from a warrant form on which the prosecuting attorney or chief deputy prosecuting attorney enters the information read by the affiant to the court. The court may direct the prosecuting attorney or chief deputy prosecuting attorney to modify the warrant. If the court agrees to issue the warrant, the court shall direct the prosecuting attorney or chief deputy prosecuting attorney to sign the judge's name to the warrant, adding the time of the issuance of the warrant.

(c) After transmitting an affidavit, a prosecuting attorney or chief deputy prosecuting attorney who applies for a warrant under subsection (a)(3) shall transmit to the court a copy of a warrant form completed by the prosecuting attorney or chief deputy prosecuting attorney. The court may modify the transmitted warrant. If the court agrees to issue the warrant, the court shall transmit to the applicant a duplicate of the warrant. The judge shall then sign the warrant retained by the court, adding the time of the issuance of the warrant.

(d) If a warrant is issued under subsection (a)(2), the court shall record the conversation and order the court reporter to type or transcribe the recording for entry in the record. The court shall certify the recording, the transcription, and the warrant retained by the court for entry in the record.

(e) If a warrant is issued under subsection (a)(3), the court shall order the court reporter to retype or copy the facsimile transmission for entry in the record. The court shall certify the transcription or copy and warrant retained by the court for entry in the record.

(f) The court reporter shall notify the prosecuting attorney or chief deputy prosecuting attorney who received a warrant under subsection (a)(2) or (a)(3) when the transcription or copy required under this section is entered in the record. The prosecuting attorney or chief deputy prosecuting attorney shall sign the typed, transcribed, or copied entry upon receiving notice from the court reporter.

SECTION 9. IC 35-33.5-2-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 5. Within twenty-eight

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(28) days after the termination of a warrant or an extension, or the denial of an application for a warrant or an extension, the court to which application for the warrant or an extension was made shall submit a report to the executive director of the division of state court administration (IC 33-24-6-1) containing the following information:

- (1) The fact that a warrant or an extension was applied for.
- (2) The type of warrant or extension applied for.
- (3) The fact that the application for a warrant or an extension was granted, modified, or denied.
- (4) The duration authorized for interception by the warrant and the number and duration of any extensions.
- (5) The designated offense for which the warrant or extension was issued or applied for.
- (6) The identity of the persons who applied for the warrant or extension.
- (7) The nature and location of the place, ~~or~~ facility, **or device** from which communications were to be intercepted.
- (8) The reasons for withholding notice under IC 35-33.5-4-3, if the notice was withheld.

SECTION 10. IC 35-33.5-3-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 1. (a) A court may enter an order authorizing a warrant or an extension if, based on the facts submitted by an applicant, the court determines the following:

- (1) Probable cause exists to believe that the person whose communications are to be intercepted is committing, has committed, or may commit a designated offense.
- (2) Communications concerning the designated offense identified in the warrant application are likely to be obtained through the requested interception.
- (3) Exigent circumstances are present that require the preservation of secrecy where there is a reasonable likelihood that a continuing investigation would be prevented if a person subject to investigation was alerted to the fact that the investigation was occurring.
- (4) A place, ~~or~~ facility, **or device** from which communications are to be intercepted is:
 - (A) being used or about to be used by;
 - (B) listed in the name of;
 - (C) leased to; or
 - (D) commonly used by;
 a person who is committing, has committed, or may commit a designated offense.

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(5) Investigative procedures:

(A) have been tried but have failed;

(B) are unlikely to succeed; or

(C) are too dangerous to attempt.

(b) In making a determination of probable cause required under subsection (a)(1) before a warrant may be issued by the court, the court may examine under oath any person. The court shall order the court reporter to:

(1) prepare a verbatim transcript of an examination made under this subsection; and

(2) attach the transcript to the application for the warrant.

(c) In making a determination of probable cause required under subsection (a)(1) before a warrant may be issued by the court, if there is no corroborative evidence offered in support of the allegation of probable cause, the court shall inquire in camera concerning:

(1) the identity of any informants; or

(2) any additional information the court considers relevant to a determination of probable cause to believe that the person whose communications are to be intercepted is committing, has committed, or may commit a designated offense.

(d) The court may modify the application and authorize a warrant or an extension that is more limited in authority for interception than the warrant or extension that was requested by the applicant.

SECTION 11. IC 35-33.5-3-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 2. A court that issues a warrant or an extension shall specify the following information in the warrant:

(1) The identity of the law enforcement agency that the warrant directs to make the interception.

(2) The identity of the person, if known, whose communication is to be intercepted.

(3) The nature and location of the facility, ~~or~~ place, **or device** from which the communication is to be intercepted.

(4) The type of communication to be intercepted and a statement of the designated offense to which the communication relates.

(5) That the interception must be conducted in a manner that minimizes the interception of communication that:

(A) is not relevant to the designated offense; and

(B) is not authorized by the warrant or extension.

(6) That methods required by the court to minimize the interception of irrelevant communications include the immediate termination by a law enforcement officer of the recording of a

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communication that is clearly irrelevant to the investigation of a designated offense.

(7) The duration during which the interception is authorized, including a statement as to whether the interception automatically terminates once the described communication is initially obtained.

SECTION 12. IC 35-33.5-4-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 1. (a) A court may not authorize interception under a warrant or an extension for a period longer than is necessary to achieve the objective of the warrant or extension. **Except as provided in subsection (d),** a warrant and each extension may authorize interception for not more than ~~fourteen (14)~~ **thirty (30)** days. A court that issues a warrant or an extension shall order that the authorized interception must:

(1) occur within ~~three (3)~~ **ten (10)** days after the court issues the warrant or extension;

(2) be conducted in a manner that minimizes the interception of a communication that is clearly irrelevant to the investigation of a designated offense; and

(3) terminate upon completion of the authorized objective or within ~~fourteen (14)~~ **thirty (30)** days after the interception begins, whichever occurs first.

(b) A court may grant not more than three (3) extensions.

(c) A warrant or an extension may direct that a person immediately furnish an applicant all information, facilities, and technical assistance within that person's control necessary to accomplish the interception with a minimum of interference with the services that the person is furnishing to the person whose communication is to be intercepted. The applicant shall compensate a person furnishing facilities or technical assistance to the applicant at the prevailing rates.

(d) A warrant issued under section 3.5 of this chapter expires after twenty-four (24) hours, unless:

(1) the court that issued the warrant established a shorter period of expiration; or

(2) the warrant is extended in accordance with section 2 of this chapter.

A warrant extended in accordance with section 2 of this chapter expires as described in subsection (a).

SECTION 13. IC 35-33.5-5-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 2. (a) The contents of an authorized interception under this article shall be ~~mechanically or electronically~~ recorded. Immediately upon the expiration of the warrant

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1 or extension, the court shall order that recordings be sealed. The court
 2 shall determine who is entitled to custody of the recordings. The court
 3 shall order that the recordings be kept for at least ten (10) years. The
 4 recordings may be destroyed after ten (10) years only upon an order of
 5 the court that issued the warrant.

6 (b) A warrant or an extension granted under this article, as well as
 7 the application for a warrant or extension, shall be sealed by the court
 8 to which the application is made. The court shall determine who is
 9 entitled to custody of the application and warrant or extension. An
 10 application and a warrant or an extension shall be disclosed only upon
 11 a showing of good cause before the issuing court. The court shall order
 12 that the application and warrant or extension may not be destroyed for
 13 at least ten (10) years after the date granted, and then only upon the
 14 order of the court that issued the warrant.

15 SECTION 14. IC 35-33.5-5-6 IS AMENDED TO READ AS
 16 FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 6. ~~Telephone or~~
 17 ~~telegraph companies, their officers, agents, landlords, custodians, or~~
 18 ~~other persons who provide information, facilities, or technical~~
 19 ~~assistance in accordance with this article~~ **The following persons are**
 20 **immune from civil and criminal liability for an act or omission that**
 21 **relates to the provision of information, facilities, or technical**
 22 **assistance in accordance with this article:**

23 **(1) A person who provides services that relate to the provision**
 24 **of electronic communication.**

25 **(2) An employee, an officer, an agent, or a contractor of a**
 26 **person described in subdivision (1).**

27 **(3) A landlord, a custodian, a property owner, or other person**
 28 **who provides assistance in the interception of an electronic**
 29 **communication.**

30 SECTION 15. IC 35-33.5-3-3 IS REPEALED [EFFECTIVE JULY
 31 1, 2007].

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SENATE MOTION

Madam President: I move that Senator Wyss be added as second author of Senate Bill 411.

HERSHMAN

COMMITTEE REPORT

Madam President: The Senate Committee on Corrections, Criminal, and Civil Matters, to which was referred Senate Bill No. 411, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

- Page 2, line 17, after "data," insert "**oral communication**,".
- Page 9, line 1, strike "fourteen (14)" and insert "**thirty (30)**".
- Page 9, line 4, strike "three (3)" and insert "**ten (10)**".
- Page 9, line 10, strike "fourteen (14)" and insert "**thirty (30)**".

and when so amended that said bill do pass.

(Reference is to SB 411 as introduced.)

STEELE, Chairperson

Committee Vote: Yeas 9, Nays 0.

SENATE MOTION

Madam President: I move that Senator Steele be added as coauthor of Senate Bill 411.

HERSHMAN

COMMITTEE REPORT

Mr. Speaker: Your Committee on Interstate and International Cooperation, to which was referred Senate Bill 411, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

- Page 2, line 11, delete "in another jurisdiction" and insert "**under**

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the law of the United States or in another state or country".

Page 4, line 3, after "(e)" insert "The superintendent of the state police department may terminate an interception under this chapter if the superintendent of the state police department determines that there is probable cause to believe that the allegations concerning the offense that are the basis of the interception are without merit. If an interception of an electronic communication is terminated under this subsection, the law enforcement agency that is the co-applicant for the interception shall reimburse the state police department for the department's expenses incurred in connection with the application for interception, including the costs of removing equipment related to the interception.

(f)".

and when so amended that said bill do pass.

(Reference is to SB 411 as printed February 16, 2007.)

HARRIS E, Chair

Committee Vote: yeas 10, nays 0.

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